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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 96-133
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	

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REPLY COMMENTS OF SUPERSTAR SATELLITE ENTERTAINMENT

Superstar Satellite Entertainment ("Superstar") hereby submits these Reply Comments in response to the comments filed by various parties in this annual competition inquiry. The scope of Superstar's Reply Comments is limited to the issue of whether the Commission should award damages in program access complaint proceedings. Specifically, Superstar's Reply Comments illustrate why a damages remedy is both beyond the Commission's jurisdiction and unnecessary.

I. Introduction and Summary

In the first and second reports assessing competition in the market for delivery of video programming, the Commission found that the program access rules were operating as

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intended.[1] In both reports, the Commission concluded that its enforcement of the program access provisions of the 1992 Cable Act appeared "to be ensuring competing video distributors' access to satellite programming from vertically-integrated programming services."[2] Indeed, only 30 program access complaints have been filed since 1993 when the Commission's program access rules were adopted, 20 of which have been resolved – further evidence that the program access rules are working.[3]

In addition, the Commission's *1995 Report* announced a significant increase in the number of subscribers to competing multichannel video programming distributors ("MVPDs").[4] For example, the Commission noted that the Home Satellite Dish ("HSD") market was expanding at record rates.[5] The Commission also observed an increase in the number of launched and planned programming services that are not vertically integrated.[6] Today's thriving competitive marketplace promises to become even healthier once the Telecommunications Act of 1996 and its implementing regulations become fully effective and more new entrants emerge.

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[1]*See First Report in the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd. 7442, 7528 ¶ 173 (1994)("*1994 Report*"); *Second Annual Report in the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 95-61 (rel. December 11, 1995)("*1995 Report*") at ¶ 207.

[2]*1995 Report* at ¶¶ 207, 160; *1994 Report* at 178.

[3]For example, six complaints that were pending against United Video Satellite Group, Inc. and UV Corporation d/b/a Superstar Satellite Entertainment were resolved this year. *Order*, CSR Nos. 4284-P, 4285-P, 4296-P, 4297-P, 4298-P and 4299-P (rel. July 1, 1996).

[4]*1995 Report* at ¶ 9.

[5]*See 1995 Report* at ¶ 63 ("Mirroring the success of DBS service in 1994, HSD users increased by more than 640,000, a record number.").

[6]*Id.* at Appendix H, Tables 2 and 4.

Notwithstanding the effectiveness to date of the current program access rules and the robust level of competition in today's marketplace, National Rural Telecommunications Cooperative ("NRTC") has utilized this comment proceeding to repeat arguments in favor of adding a damages remedy for violation of the program access rules.[7] The Commission has declined to adopt a damages remedy in the past and nothing in the 1995 Report or the comments in this proceeding provides a reasonable basis for overturning the Commission's decision.

II. Damage Remedies Are Neither Necessary Nor Appropriate Under the Program Access Rules

The Commission twice considered, and twice declined to adopt, damages as a remedy for violations of the program access rules. In its *Report and Order* adopting the program access rules, the Commission found that in most cases, the only appropriate remedy would be to amend the disputed program distribution agreement, prescribe pricing prospectively, and that at most, forfeitures under Title V would be appropriate.[8] On reconsideration, the Commission reaffirmed its decision not to adopt a damages remedy, questioning the need for such a remedy when the existing rules and remedies were "successfully working," *i.e.*, providing competing multichannel systems greater access to cable programming services.[9] In fact, the Commission

[7]NRTC Comments at 8.

[8]*In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 F.C.C. Rcd. 3359, 3420 (1993) ("*Report and Order*").

[9]*Memorandum Opinion and Order on Reconsideration of the First Report and Order*, FCC 94-287, MM Dkt. No. 92-265, ¶ 18 (Dec. 9, 1994) ("*Order on Reconsideration*").

stated that it would not revisit the issue of damages absent *evidence* that the existing program access rules and remedies were no longer working.[10]

Nevertheless, NRTC has yet again raised the issue of a damages remedy.[11] NRTC has not offered any evidence that the Commission's existing program access rules and remedies are not working. Instead, NRTC's comments consist of broad, speculative and unsupported allegations about the possible drawbacks of not having a damages provision.[12] NRTC presented identical arguments to the Commission in its Petition for Reconsideration of the *First Report and Order*.[13] NRTC was unable to persuade the Commission of a need for a damages provision at that time and has presented nothing new to support adoption of a damages provision today. In fact, the increased levels of competition in the distribution and programming services markets and the elimination of barriers to entry precipitated by the 1996 Act suggest that there is even less of a need for a damages provision today than when the Commission first promulgated the program access rules in 1993.

Moreover, as Superstar has previously asserted, the Commission lacks power to adopt a damages remedy except as provided for under Title V, or any other provision of the Communications Act. 47 U.S.C. § 628(e)(2).[14] Although damages may be awarded under Title

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[10] *Id.*

[11] *1995 Report* at ¶ 165 n. 453; NRTC Comments at ¶ 13.

[12] NRTC Comments at ¶ 13 (discussing effects that failure to award damages "may" create).

[13] *See Order on Reconsideration* at ¶ 10 (paraphrasing NRTC's arguments).

[14] The Commission's authority to award damages is expressly limited by the terms of the Section 628. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988).

II of the Communications Act against communications common carriers, none of the programmers subject to Section 628 are "common carriers" subject to Title II, and thus, Title II remedies are not "available." Moreover, the type of damages available under Title II, lost profits, are different than the rate refunds, which is the type of damages sought by NRTC.[15] Nor would application of the lost profits standard be feasible in the context of Section 628 complaints given the numerous differences among competing distributors, other than programming, that contribute to customers' decisions to select a particular distributor. Accordingly, inclusion of a Title II damages remedy is not a viable solution.

Finally, a damages remedy would not fit within the existing program access rules. Except for claims brought under Section 628(b), program access complainants are not required to demonstrate competitive harm. It would be inappropriate to award damages where no harm has been demonstrated and the prospect of an award would undoubtedly be the impetus for many frivolous program access complaints. Clearly, MVPDs who believe they have been disadvantaged have filed complaints and had them resolved. No MVPD has said it did not file a complaint because of the absence of a damage remedy.

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[15] *I.C.C. v. United States*, 289 U.S. 385, 389 (1933); *Illinois Bell Telephone Co. v. American Telephone and Telegraph Co.*, 66 RR2d 919, n. 13 (1989).

CONCLUSION

For the foregoing reasons, the Commission should, once again, decline to consider the adoption of a damages remedy for violations of the program access rules.

Respectfully submitted,

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